No. 4247

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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CHARLES WEDEL,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR

**Upon Writ of Error to the Northern Division of the United States District Court of the Northern District of California, Second Division.**

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### Statement of Facts.

On January 27, 1923, a bill in equity was filed in the office of the clerk of the United States District Court, for the Northern District of California, Northern Division, in the name of and in behalf of the United States by J. T. Williams, Esquire, United States Attorney, and Garton D. Keyston, Esquire, Assistant United States Attorney for the Northern District of California, seeking to abate and enjoin a certain common nuisance, to wit: The violation of section 21 of title II of the act of Congress of October 28, 1919, known as the "National

Prohibition Act", which was alleged in said bill of equity to exist in a certain hotel known and designated as the "Speedway Hotel", in the Town of Cotati, County of Sonoma, State of California. The property is more particularly and fully described on page 2 of the transcript of record in this case.

The said bill in equity alleges that the plaintiff in error, Charles Wedel, was and is the owner of said property and was the owner of the business conducted on said premises; that on January 31, 1923, the Honorable William C. Van Fleet, Judge of the United States District Court for the Northern District of California, made an order that a temporary writ of injunction should be issued restraining and enjoining the plaintiff in error, his agents, servants, representatives, managers, and employees, and all others, as prayed for in said complaint; that in pursuance of such order a temporary writ of injunction was issued on said 31st day of January, 1923. (Transcript of record, page 4.)

That thereafter plaintiff in error, Charles Wedel, filed with the clerk of said court his duly verified answer to said bill in equity; that by said answer certain issues of fact were raised and the action in equity at the time the proceedings were had which are now before this court for review, was and still is at issue and ready for trial; that said action has never been tried, and the issues raised by said bill in equity and the answer filed thereto have never been tried nor determined.

That on February 28, 1924, an affidavit was filed in the office of the clerk of the United States District Court, Northern District of California, subscribed and sworn to by one C. W. Ahlin, who was then and there employed by the Government of the United States in the capacity of Federal Prohibition Agent, alleging that on the 20th day of January, 1924, the affiant purchased four drinks of whiskey, then and there containing more than one-half of one per cent of alcohol from the plaintiff in error, Charles Wedel, and that he paid the said Charles Wedel the sum of two dollars therefor.

That on February 28, 1924, a writ of attachment was issued by the said District Court directed to the Marshal of said District, commanding him to arrest the said Charles Wedel for an alleged contempt in violating the said temporary writ of injunction.

That thereafter, on March 6, 1924, plaintiff in error was arrested by virtue of the said writ of attachment and on March 18, 1924, the hearing of the matter of the alleged contempt of the said Charles Wedel was had before the Honorable John S. Partridge, District Judge at Sacramento, in the said Northern District of California, Second Division, and at said hearing the Government introduced the affidavit of the said C. W. Ahlin (Transcript of record, page 7) and no other evidence.

Plaintiff in error was found guilty by the court and was ordered to be imprisoned for a period of

six months in the County Jail of Sonoma County, State of California, and to pay a fine in the sum of five hundred ($500.00) dollars, or in default of the payment of said fine, that he be further imprisoned for a period of five (5) months in said County Jail.

From said order of imprisonment and fine plaintiff in error prosecutes this writ of error to the Circuit Court of Appeals, in and for the Ninth Circuit.

## The Law of the Case.

It is the contention of plaintiff in error that the District Court was without jurisdiction to issue the said temporary injunction because section 21 of title II of the National Prohibition Act is unconstitutional and void. If such be the case it naturally would follow that no contempt could be committed in the violation of such temporary injunction, and that the proceedings under which the plaintiff in error was ordered to be imprisoned and fined were therefore without jurisdiction and void.

In support of this contention we cite the recent decision of the District Court of the United States for the District of Nebraska, Omaha Division, in the case entitled *United States v. Lot 29, Block 16, Nebraska et al.,* 296 Fed. Rep. 729.

In that case a search warrant was issued by the United States Commissioner, and prohibition agents entered the home of the defendant and arrested the defendant and his wife, and information was duly filed against both husband and wife, but there not

being sufficient evidence against the wife, she was accordingly dismissed. The husband pleaded guilty and was sentenced. In the prosecution of the search warrant a considerable quantity of liquor was found and confiscated, and therefore an action in equity was brought to abate the alleged nuisance and an injunction was prayed for. Defendant filed a motion to dismiss for want of equity jurisdiction, which was granted on the grounds that the provisions of the National Prohibition Act authorizing the issuance of such injunctions were unconstitutional and void.

The court decided that said provisions of the National Prohibition Act were unconstitutional because they merely provided a means to suppress crime as such, and to punish criminals as such by proceedings contrary to the constitutional requirement that all crimes shall be tried by jury.

We quote from the opinion of the learned judge in that case:

> "It might be possible to construe section 22 to mean that injunctions are to issue only where there is proof of reasonable grounds to apprehend future maintenance of a nuisance independently of the past offenses, and so to decide this case on such consideration of the Statute. But I am persuaded that such is not the right interpretation, and that Congress intended to confer equity power to abate and enjoin liquor nuisances and to 'pad-lock' dwelling houses without regard to the situation at the time of the hearing of the injunction suit.
>
> There is reason to believe that the simple declaration 'all crimes shall be tried by jury'

was incorporated in the Constitution of the United States with a very determined purpose to absolutely prevent any court of criminal jurisdiction like that of the Star Chamber Court ever coming into existence in this country.

But if equity courts, as such, may function for the suppression of crime, as provided in this statute; if such courts may without a jury inquire into alleged crimes against the liquor law and may issue their injunctions because they find that in the past such crimes have been committed, and may thereafter punish for contempt, it would seem that all of the important powers of the Court of Star Chamber are assumed in this indirect way.

In the case at bar, the court is asked to inquire, without a jury, whether the defendant, sometime previous to the institution of the suit, made and sold liquor. If the chancellor is satisfied that he did, this law says that the chancellor may evict the defendant from his home and close up his home for a year, thereby imposing upon him an indeterminate but absolute penalty. The court may not know the exact extent to which a residence property will be damaged and deteriorated in this city if left vacant and unoccupied for a year, but it may take judicial notice that such damage might be greater than a sum equivalent to the reasonable value of its use. In addition to this indeterminate penalty, the court is asked to enjoin the defendant perpetually from committing further crimes against the liquor law. There is no scintilla of evidence that he would commit such crimes without the injunction, except the inference that he probably will offend again because he offended in the past. After the injunction laid upon him for the rest of his natural life, or as long as he occupies his home, any accusation against him of liquor vio-

> lation must be tried without a jury, and by the chancellor in a contempt case."

We feel that the reasons set forth by the court in the case above cited are unanswerable, and that the provisions of the National Prohibition Act authorizing the Federal Judge to issue a temporary or a permanent injunction restraining a defendant who has already been convicted of selling liquor upon the premises occupied by him, and punished therefor, are in violation of the constitutional provision that all crimes must be tried by a jury.

In the case at bar the plaintiff in error was convicted of the violation of the National Prohibition Act upon the premises in question; a temporary injunction was issued restraining further violation by plaintiff in error upon said premises; the Government goes no further in the matter and never tries the action in equity wherein they contend that the maintenance of these premises constitutes a public nuisance. More than one year after the issuance of the temporary injunction a prohibition agent makes an affidavit that he purchased four drinks of whiskey upon said premises from plaintiff in error. This fact, if true, constituted a new violation of the National Prohibition Act. It was an offense for which plaintiff in error could be tried and convicted and sentenced under said National Prohibition Act. Plaintiff in error was entitled to a trial by jury under the provisions of the Constitution of the United States. Instead of arresting him for a violation of the National Prohibition Act

the Government seeks to punish him for the same alleged acts upon affidavit only, without extending to him the privilege of being confronted by the witnesses against him, without an opportunity to cross-examine such witnesses, and without allowing him his constitutional right of having a jury pass upon the fact as to whether or not he was or was not guilty of such acts.

We must conclude that the facts of the case at bar constitute stronger reasons for declaring these provisions of the National Prohibition Act unconstitutional than the case decided by the District Court for the District of Nebraska.

It is now universally held, except where there is express statutory provision therefor, that equity has no jurisdiction over a criminal offense, and acts or omissions will not be enjoined merely on the ground that they constitute a violation of law and are punishable as crimes. In ordinary circumstances a complete and adequate remedy for the violation of criminal statutes is afforded by the courts of law, and if a criminal prosecution will constitute an effectual protection against the acts or omissions complained of, no grounds exist for relief by injunction. It is not the intention of the law that constitutional provisions shall be evaded by substituting a civil for a criminal procedure or a single judge for a jury. 32 *Corpus Juris*, page 275 and cases cited.

The above appears to be the general rule relative to the granting of injunctions to restrain the com-

mission of acts which constitute crimes. There appears however, to be an exception to this general rule that where the intervention of equity by injunction is warranted by the necessity of protection to civil rights or property interests, the mere fact that a crime or statutory offense must be enjoined as incidental thereto will not operate to deprive the court of its jurisdiction.

This appears especially to be true in the case of public nuisances, and undoubtedly the Government will contend in the case at bar that the statute having declared expressly that the maintenance of a place where liquor is sold constitutes a public nuisance that the courts of equity can by injunction restrain the maintenance of such a place and can therefore punish by contempt those who violate such injunction.

In the case of *In re Debs*, 158 U. S. 564, the court decided that the issuance of an injunction restraining the defendants in such proceedings from interfering with the United States mails and the punishment for contempt for the disobedience of such injunction did not deprive the petitioner in that case of his constitutional right of trial by jury because the United States Government had a property interest in the mails, which was being jeopardized by threatened acts of violence; and therefore, there being no plain, speedy or adequate remedy at law a court of equity could grant such injunction.

In so far as we have been able to find from the authorities, a court of equity has granted an in-

junction in those cases only where the right of property exists, where it is necessary to protect civil rights or property interests and where the criminal courts are unable to give adequate relief. Such is not the case at bar. The granting of the injunction in this case is not necessary to protect any civil or property rights, and the same acts which would constitute a violation of such an injunction are expressly punishable as crimes under the National Prohibition Act. We therefore earnestly contend that the granting of an injunction, and the punishment for contempt for its violation would constitute a deprivation of the right of trial by jury, and that a statute which would give to the courts of equity the right to grant injunctions against the commission of acts which are solely criminal, would be unconstitutional and void.

We do not contend that the act is invalid in so far as it provides for the abatement of nuisances that are existing or shown by competent evidence to be threatened, but that portion of the act is unconstitutional which attempts to confer the power upon equity courts to punish for contempt any act in violation of the constitutional requirement that the trial of all crimes shall be by jury.

If these provisions of the law are constitutional, the defendant, in a case like the one at bar may be indicted and convicted for the violation of the National Prohibition Act, and the District Attorney

may institute proceedings in equity to abate the alleged nuisance and obtain a temporary injunction against the selling of liquor upon defendant's premises. Thereafter, at any time liquor is sold upon the said premises, the District Attorney may elect between proceedings in the regular way by information or indictment for the new crime committed upon the said premises, which gives the defendant a right to a jury trial and all privileges called for in the criminal law, or he may have the defendant brought before a single judge, without a jury, by summary proceedings, and subject to the same punishment without being confronted by witnesses, without the right of cross-examination, without the presumption of innocence, or the right to be tried by a jury; in fact to deprive him of all rights and privileges granted to him under our criminal procedure. We do not believe that the courts can possibly sustain a procedure which would confer upon a single person, namely the United States District Attorney, such a power. If this power exists there seems to be nothing to prevent a District Attorney from proceeding both ways, that is, by criminal indictment and punishment and also by punishment for contempt in the commission of precisely the same acts.

We respectfully submit that in view of the reasons here stated that the provisions of the National Prohibition Act herein complained of are unconstitutional and void, and that all proceedings had

thereunder are therefore void, and that the petitioner is entitled to be discharged.

Dated, San Francisco,
October 11, 1924.

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